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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 445

ABE BERNSTEIN, MOREY BERNSTEIN, SAM BERNSTEIN, BERNSTEIN BROS. PIPE AND MACHINERY COMPANY, a Corporation, MAURICE LEVY, ROSE LEVY, ALBERT BENSIK, and MODERN SPECIALTY DISTRIBUTORS, a Partnership, *Petitioners,*

vs.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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ABE BERNSTEIN, MOREY BERNSTEIN, SAM BERNSTEIN, BERNSTEIN BROS. PIPE AND MACHINERY COMPANY, a Corporation, MAURICE LEVY, ROSE LEVY, ALBERT BENSIK, and MODERN SPECIALTY DISTRIBUTORS, a Partnership, *Petitioners,*

vs.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOREY BERNSTEIN; SAM BERNSTEIN; BERNSTEIN BROS. PIPE AND MACHINERY COMPANY, a corporation; MAURICE LEVY; ALBERT BENSIK, on behalf of himself and on behalf of Albert Bensik doing business as Modern Specialty Distributors; and MODERN SPECIALTY DISTRIBUTORS; respectfully pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered May 23, 1958, in Cases 5704 and 5705 (cross appeal) below.*

OPINIONS BELOW

The opinion of the United States Court of Appeals (reproduced in the appendix hereto) appears in 256 F. 2d

*The case was dismissed as to Abe Bernstein and Rose Levy.

697 (advance sheets). The opinion of the District Court was filed February 20, 1957, and appears in 149 F. Supp. p. 568. The opinion is reproduced in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was dated and entered May 23, 1958; petition for rehearing was timely filed June 7, 1958; and the rehearing was denied on July 28, 1958. The jurisdiction of this Court is invoked under 28 USC, §1254(1), authorizing this Court to review the judgment of the Court of Appeals by Writ of Certiorari.

QUESTIONS PRESENTED

1. Whether the refusal of the trial court to compel the government to produce the report of its investigator, Poyen: (1) for trial preparation and (2) at the trial for cross-examination after he had testified that he had refreshed his recollection from the report which he had made at the conclusion of his investigation—9½ years prior to the trial—was reversible error in that it violated due process of law and is contrary to the decision of the United States Supreme Court in *Jencks v. U. S.*, 353 U. S. 657, 1 L. ed. 2d 1103, 77 Sup. Ct. 1007, and in conflict with the decision of the Court of Appeals of the District of Columbia in *Communist Party of the United States of America v. Subversive Activities Control Board*, decided January 9, 1958, 254 Fed. 2d 314.

2. Whether the provisions of the Surplus Property Act of 1944, 58 Stat. 765, 50 USC App. (1946 Ed.) 1611, carried over into the Federal Property and Administrative Services Act of 1949, 63 Stat. 378, 392, 40 USC 471, 489, governing the disposal of government property, permits the government after an unequivocal statutory election of affirmance of sale, to years later change its election to disaffirmance and demand for restitution when restitution is no longer possible.

3. Whether the ruling of the Court of Appeals, to the effect that the decision of the United States Supreme Court in *U. S. v. Oregon Lumber Co.*, 260 U. S. 290, 67 L. ed. 261, 43 S. Ct. 100, (on the question of election of remedies) was impliedly nullified by the adoption of the Federal Rules of Civil Procedure, so that the government was not bound by its election, is in accordance with law.

4. Whether the regulations and certificates of the War Assets Administration were sufficiently clear and definite to afford the defendants due process of law so as to enable defendants to know in advance that the course of action followed by them was unlawful, if it were unlawful, and would subject them to the penalties of the law.

5. Whether the regulations governing the sale of surplus property which permit a veteran to purchase on priority as a "dealer, jobber or distributor" certain types of property for the purpose of reselling the same, can properly be construed as forbidding purchases for resale if the veteran plans in advance to resell in large part to his employer—no such prohibition appearing in either the regulations or the statute.

6. Whether there was sufficient evidence to sustain the finding of a fraudulent conspiracy, either in law or in fact.

STATUTES AND REGULATIONS INVOLVED

Surplus Property Act of 1944, Act of October 3, 1944, 58 Stat. 765, USCA Title 50, Appendix, §1611, p. 695, provides:

> "The Congress hereby declares that the objectives of this Act * * * are to facilitate and regulate the orderly disposal of surplus property so as * * * (f) to afford returning veterans an opportunity to establish themselves as proprietors of agricultural, business and professional enterprises * * * (r) to dispose of surplus property as promptly as feasible without fostering monopoly or restraint of trade or unduly

disturbing the economy, or encouraging hoarding of such property, and to facilitate prompt redistribution of such property to consumers;"

§1625, Disposition to Veterans:

"The Board shall prescribe regulations to effectuate the objectives of this Act to aid veterans to establish and maintain their own small business, professional or agricultural enterprises, by affording veterans suitable preferences to the extent feasible and consistent with the policies of this Act in the acquisition of types of surplus property useful in such enterprises."

§1635, 50 USC Appendix (1946 Edition) 58 Stat. 780, provides as follows:

"(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—

"(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

"(2) shall, *if the United States shall so elect,** pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

"(3) shall, *if the United States shall so elect,** restore to the United States the property thus secured and obtained and the United States shall retain as liqui-

*Emphasis added.

dated damages any consideration given to the United States or any Government agency for such property.

* * * * *

"(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law." * * *

THE REGULATIONS

For the purpose of effectuating the veterans' preference, the War Assets Administration allocated all surplus personal property into two separate types:

1. Property in great demand by veterans and scarce supply which could be sold only to veterans for their own use.

2. Property which veterans could buy for resale.

Property for personal use only. Section 8302.4 of the Regulations of May 3, 1946, U. S. Congressional Code Service, 79th Cong. 2nd Session, 1946, p. 2067, provides:

"*Set-asides for veterans.* (a) Each disposal agency to which there is assigned for disposal any property of the types set forth in Exhibit A hereto shall set aside all of such property in its possession for exclusive disposal to veterans for their own personal use, or to enable them to establish and maintain their own small business, professional, or agricultural enterprises." * * *

Exhibit A of the Regulations enumerates as included in this type motor vehicles, including passenger cars, trucks, jeeps, etc., portable and stationary air compressors, various types of agricultural machinery and typewriters. This enumeration is set forth in the amended Exhibit A issued by the War Assets Administration on June 14, 1946, and appearing in Congressional Code Service, 79th Cong. 2nd Session, 1946, at p. 2073.

Section 8302.8, p. 2069 (see appendix p. 59) provides for the issuance of certificates to the veterans for the pur-

chase of such scarce property upon the production of the applicant's discharge papers and a description of the property desired and a certificate that the property applied for is for his own personal use or to enable him to establish his own small business and not for resale. (The "veteran front" cases relied on by the Court and the government all relate to that type of property.)

Property for resale. Section 8302.9 (p. 2070) provides as to veterans' preference:

> (b) *"Except in the case of . . . disposals to veterans of property to be resold"* with or without processing or fabrication in the regular course of business, transfers or disposals to priority claimants shall be for their own use only and not for transfer or disposition by them to others, and disposal agencies may require priority claimants so to certify."

. . . . . .

§8302.1(4), p. 2066, provides:

> "(4) 'Own' business or professional or agricultural enterprise of a veteran means one of which more than fifty (50) per cent of the invested capital thereof is beneficially, and not merely nominally or formally, owned by a veteran or veterans, or one of which more than fifty (50) per cent of the net income thereof beneficially, and not merely nominally or formally, accrues to a veteran or veterans." . . .

There was nothing in the regulations prohibiting (as to this non-scarce property) purchase for resale arranged for in advance nor anything forbidding financing by others, nor even any express prohibition against purchase as agent for another.

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*Emphasis added.

CERTIFICATE REQUIRED BY WAR ASSETS

The certificate required of the veteran buying for resale read as follows:

(Pl. Ex. 4, R. 345)

"Dealer, Jobber, Distributor
Certification

"I hereby certify that I am, or have made necessary arrangements to become, an established dealer, jobber, or distributor of the kind who customarily take into their possession and have full control for the purpose of reselling property of the kind covered by this order; that I am not a broker, and will not use the property ordered to operate as a broker, whose business it is to bring buyers and sellers together, and who does not normally take title to or possession of property and is generally an agent of one of the parties to a sale; and that I will not engage in 'drop sale' disposal of the property ordered. I further certify that I now have, or have made definite arrangements for, a suitable office and operating and storage space, and that I am sufficiently financed to enable me to conduct my business of the kind above stated. I further certify that I have obtained licenses required to carry on such business, if they are necessary.

"I have read the above.

"Date: 11-19-46.

"Signature ALBERT W. BENSIK."*

*The Court of Appeals held this was the only certification made by Bensik relevant to the purchase of the heaters. The District Court had held that a prior certification for different property was applicable and that as applied to this sale was false. Said the Court of Appeals (Opinion 256 Fed. 2nd p. 701):

"Nor do we think the representations made for the first certification pertinent to the later certification for the property in question. The first priority was for the veteran's own use, not for resale. The second priority was for property intended for resale and the latter representations superseded the former and is relevant to the challenged transaction."

STATEMENT

The action was brought by the United States under ¶1635(c) of the Surplus Property Act of 1944 giving the United States District Court jurisdiction. 58 Stat. 765, 50 USCA (App.) (1946 Ed.) ¶1635, p. 624.

The District Court found that defendants had conspired to fraudulently use the veteran's priority of defendant Bensik in the purchase of war surplus "ostensibly in his own behalf but actually in behalf * * * of Bernstein Bros. Pipe and Machinery Co.," in violation of the statute aforesaid. Its finding was affirmed by the Court of Appeals in No. 5704 below. In No. 5705 (cross appeal) the Court of Appeals reversed the judgment of the District Court that the United States was bound by its election affirming the sale and seeking liquidated damages.

Defendant Bensik, a war veteran, doing business as Modern Specialty Distributors, was a salesman for Bernstein Bros. Pipe & Machinery Company, a corporation, and conducted on the side his own business of selling miscellaneous items, including airplane heaters (R. 296, 335).

The War Assets Administration advertised for bids for various condemned airplane heaters (283, 296, R. 437, Ex. F), including 928 Herman Nelson heaters, the bids to be received and opened on November 21, 1946, at San Antonio, Texas (R. 437).

Both veterans and non-veterans had a right to bid and the highest bid received from any source fixed the price at which the surplus would be sold. Veterans willing to pay that price were given priority (R. 75).

Bensik, with the consent of his employer (R. 260) Bernstein Bros. corporation, offered to purchase 600 of the heaters at the price set by the high bid. Under his priority he was awarded the right to purchase the 600 heaters at the price set by the high bid (R. 344, Ex. 2).

He was financed in the purchase by Maurice Levy, the Bernstein Co. general manager, who loaned $20,000 to his

wife (Bernstein's sister) to enable her to make the loan to the veteran (R. 285). The bona fides of this loan was challenged by the government. (This was prior to the advent of the husband and wife joint split income tax return.) He paid for the heaters (P. Ex. 46, R. 389) with the borrowed money (R. 422 and 423, Ex. 73 and 74).

Before purchasing he advised War Assets of his intention to sell a large part of his purchase to his employer and sought its advice as to the validity of this proposal (R. 350, Pl. Ex. 8). (R. 360). (R. 351, Pl. Ex. 9; R. 420, Pl. Ex. 70; R. 419, Pl. Ex. 69; R. 421, Pl. Ex. 71).

Owing to confusion as to the meaning of the regulations and the certifications applicable to the purchase, the written replies of the government were ambiguous.* (See Exhibits above listed.)

The correspondence continued from December 10, 1946, to January 9, 1947.**

---

*Said the Regional Counsel in a letter to Bensik (p. 71, R. 421):

"... There is no specific regulation prohibiting resale of property purchased by a wholesaler to a firm with which he may be connected, or in one lot to a single retailer ..."

but that veterans and non-veterans alike were supposed to sell to independent retailers. (There was no claim below that Bernstein was not an "independent retailer.")

**Said the Court of Appeals (Opinion, 256 Fed. 2nd 702):

These communications (phone call of Nov. 20 and letter of Dec. 10) "left no doubt" that the Bernsteins "intended to acquire the major portion of the heaters to be awarded to Bensik under veteran's priority."

The chronology of the communications and sales was as follows:

Phone call Bernstein to War Assets	11/20/46	(See Ex. 8 R. 350, 86, 322, 325)
P. Ex. 8 Letter Bernstein to War Assets	12/10/46	(R. 350)
P. Ex. 9 Letter War Assets to Bernstein	12/13/46	(R. 351)
P. Ex. 70 Letter Bensik to War Assets	12/18/46	(R. 420)
P. Ex. 69 Letter War Assets to Bensik	12/27/46	(R. 419)
P. Ex. 71 Letter War Assets to Bensik	1/9/47	(R. 421)
P. Ex. 74 War Assets confirms sale to Bensik	12/18/46	(R. 423)
D. Ex. H Shipments to Bensik	12/19/46 to 1/17/47	(R. 440)
P. Ex. 34 Bensik agreement to sell to Bernstein	12/24/46	(R. 337)
P. Ex. 37 Bernstein payment checks to Bensik:		
12/27/46 $10,500		
12/30/46 7,350		(R. 380)

In the meantime, with this knowledge, War Assets commenced shipping the heaters, the final shipment to Bensik being made on January 17, 1947 (D. Ex. H, R. 440). They were shipped to him at the American Warehouse where he had rented space from the Bernsteins who owned the warehouse (R. 347, Ex. 7).

He thereafter sold 510 of the 600 purchased heaters to his employer, Bernstein Bros. Pipe & Machinery Co. (Ex. 34 and 37, R. 377, 380) which, in turn, cannibalized, rebuilt and reconditioned the heaters (R. 298, 299) and over a period of 9½ years sold them to its customers—the last sale being made in March, 1955 (R. 328).

Bensik, through his Modern Specialty Distributors company, sold, over a period of years, the 90 remaining heaters to miscellaneous purchasers at a profit of $42,000. (Under the financing agreement, Mrs. Levy received 45% thereof.) (R. 300, 301).

REFUSAL TO PRODUCE INVESTIGATOR'S REPORT

The government was faced with convincing evidence that the veteran had bought the war surplus with funds which he had borrowed from Mrs. Levy for that purpose under the terms of a written agreement and that therefore he bought as a principal and not as an agent or broker and that his resale to Bernstein was therefore in accord with the regulations.

To overcome this evidence the government sought to show that the financing agreement under which he borrowed the money was not in effect at the time he purchased from War Assets, but was an afterthought, and that therefore the loan was a sham.

To this end it called its special agent, John Poyen, who was the first of the government agents to investigate the transaction and interview the veteran. The government in its brief in the Court of Appeals (p. 11 and p. 15) utilizes his testimony thus:

(p. 11): "The arrangements between Rose and Bensik were ostensibly governed by an agreement which was prepared by a lawyer at the request of Maurice Levy and Bensik" (R. 316, 377, 379).

(p. 15): "Bensik appears to have talked freely to the investigator, even taking him to his home to show him what he was doing in regard to selling the heaters (R. 141). However, when the investigator asked Bensik how he had paid for the heaters, Bensik answered only that he had made full payment by a check in favor of the government signed by him for Modern Specialty Distributors (R. 145). *The investigator asked Bensik if he had been financed, but Bensik refused to answer* (R. 144-145). *The interview came to an abrupt close.* A month after this occurred a second investigator, Giles T. Maloney, was sent to interview Bensik. Bensik again took the investigator to his home, explaining that his books and records were there. (R. 157). This time Bensik was prepared fully to explain the financing of the venture (R. 158-159). • • • From Bensik's home, the pair went to Bernstein Brothers Pipe & Machinery Company and within two or three hours after they had left Bensik's home, Bensik produced the agreement while at Bernstein Brothers with the investigator (R. 159, 162). *Bensik did not explain where or how he had gotten the agreement.*" (Emphasis added.)

Bensik testified that he had no recollection of any such question by Poyen (R. 254).

Poyen testified that he had refreshed his recollection from his report (R. 141) and under questioning of government counsel testified:

"Q. Now, Mr. Poyen, was that the completion, after you completed your investigation what did you do then? Did you make up a report of some kind?

"A. Yes. That was not my complete investigation, but I made up a report when I did complete it.

"Q. What did you do with that report?

"A. I gave it to the special agent-in-charge in Denver here" (R. 145).

R. 152:

"Mr. Morrison Shafroth: If the Court please, I made a demand on the government to produce for me the report that was made by Mr. Poyen to the Department and I think I am entitled to see that for the purposes of cross-examination and I renew the demand at this time.

"The Court: What is the position of the Government?

"Mr. Backus: Your Honor, Mr. Shafroth has time and again made some motion to produce. We have a record of a hearing that took place sometime ago before Your Honor. He has been denied the production of these documents again and again for various reasons. I think the Court has ruled on the matter stating a number of valid reasons why these reports are not available to counsel."

And on page 153, Mr. Shafroth:

"May I state, Your Honor, the basis of my theory, which is that when a witness is used by the government who has made a report to the government and they have information in that report which will impeach the witness in any regard, then we are entitled to see the statement the prior statement, made by the witness, and throughout the examination the attorney for the Government was constantly referring to this report that had been made.

"Mr. Backus: I don't think I referred to it constantly at all, Your Honor. The only time I referred to it was

when a witness's recollection was hazy and at that point we had the interruption."

The demand for the report was denied (R. 153).

The demand for the report under Rule 35 had also been denied (R. 30).

ELECTION OF REMEDIES

The district court held that the government had elected, as required by the statute, from the three authorized statutory remedies that of liquidated damages in a sum twice the consideration paid, to-wit, $39,912.00, and that this constituted an affirmance of the contract and could not, more than 5 years later, be changed to a demand for restitution in order to increase its demand from the $39,912.00 to something over $100,000.00. In its complaint filed on February 28, 1950, long after its investigators had combed the situation from top to bottom, it demanded the liquidated damages for which the government stated defendants "are liable at the election of the United States (and which election the United States hereby makes and asserts) * * *."

The transactions complained of took place in late 1946 and early in 1947. The investigators knew and reported the complete picture to War Assets. The Court held (opinion, p. 34 App.):

> "The election which they did make on April 29, 1955 could have been made in the original complaint, and if it was made at any time should, in good conscience, have been made then."

Between the making of the original election and the final election to rescind the contract and demand restoration of the heaters, (or in lieu thereof the gross price at which they were sold after being cannibalized, repaired and reconditioned) over $44,000.00 worth of the heaters were sold —the last of all of the 510 heaters being sold in March, 1955. These undisputed facts are set forth in the District

Court's opinion on page 35 appendix finding "ample damage to the defendants upon which the doctrine of election of remedies may rest."

The Court of Appeals, in reversing the District Court on this point, rejected the doctrine of election of remedies. As laid down in *United States v. Oregon Lumber Co.*, 260 U. S. 290, 67 L. ed. 261, 43 S. Ct. 100.

REASONS FOR GRANTING WRIT

1.

The decision of the Circuit Court is in conflict with the decision of this Court in *Jencks vs. United States*, 353 U. S. 657, 1 L. ed. 1103, 77 Sup. Ct. 1007; and in conflict with the decision of the Circuit Court for the District of Columbia on the same matter in *Communist Party of the United States of America v. Subversive Activities Control Board*, 254 Fed. 2nd 314.

The importance to the administration of justice of the observance of the ruling of the Supreme Court in the Jencks case can hardly be overestimated. Attempts to whittle away its impact by speculating on the possible significance or insignificance either of the matters that might be disclosed; or of the effect which the relevant and material testimony of the investigator had on the decision of the trial court, can only weaken and render ambiguous the rule itself. The determination with which the government for five years resisted the disclosure of the investigator's report—first on demand for its production under Rule 34 F. R. C. P. (R. 18) and at the trial for cross-examination after the witness had refreshed his recollection from the report is persuasive of its importance to the defence both for trial preparation and cross-examination.

That the evidence was relevant and competent is not disputed. It falls squarely within the rule laid down by this court in the Jencks case.

> *"We reaffirm and reemphasize these essentials. For production purposes, it need only appear that the evi-*

dence is relevant, competent, and outside any exclusionary rule.'" (353 U. S. 657, 667*).

The Court of Appeals seeks to avoid the rule by minimizing the importance of special investigator Poyen's testimony, appearing in pages 139 to 155 of the record. As appears hereinbefore in this petition, it went to the vital point as to whether the transaction was real or sham. Defendant Bensik testified he had no recollection of refusing to disclose the facts as was claimed by the investigator. Throughout the trial defendants earnestly contended that the whole transaction including the financing was bona fide and not sham.

In the case of *Communist Party of U. S. vs. Subversive Activities Control Board* 254 F. 2d 314, 328 (C. A. D. C.), decided January 9, 1958, (26 Law Week 2332) not a criminal case, Judge Prettyman, speaking for the Court, said:

> "We hold that, where the government places on the stand a witness who testifies about an event long past, and it is shown that this witness at or about the time of the event made a written report to the government concerning that event, and the testimony is material, and the credibility of the witness in her testimony upon this precise point is attacked, the government upon demand must produce the report made by the witness. We think simple justice, the fundamentals of fair play, require no less. The opinion of the Supreme Court in the Jencks case, as we read it, is based upon the elementary proposition that the interest of the United States is that justice be done. The same elementary proposition applies here and leads to the same result."

Our demand for the report was the culmination of an effort to obtain it, on numerous occasions commencing in 1950, (more than seven years prior to the trial) by motion and amended motion under Rule 34 (R. 11, 15, 17).

*Emphasis added.

In the case of *State of Arizona vs. State of California, et al.*, United States of America, Intervenor, pending in the Supreme Court of the United States, in a hearing before the Honorable Simon H. Rifkind, Special Master, it was ruled that the Jencks decision applied to civil as well as criminal cases. Judge Rifkind said (R. p. 15,315):

> "As to this being a civil rather than a criminal proceeding, I do not think that the rule laid down in the *United States v. Jencks* derives from the circumstance that it is a criminal proceeding. I think it is in the category of fair procedure."

We submit that the refusal of the Court to compel production was contrary to the decision in the *Jencks* case and the *Control Board* case, *supra*, and was prejudicial error, and is of such importance as to require certiorari.

2.

The decision of the Circuit Court is in conflict with the decision of this Court in *U. S. vs. Oregon Lumber Co.*, 260 U. S. 290, 67 L. ed. 261, 43 S. Ct. 100. The provisions of the Surplus Property Act of 1944, quoted hereinabove, do not permit the government after an unequivocal statutory election of affirmance of sale, to later change its election, after filing the original complaint, to disaffirmance and demand for restitution when restitution is no longer possible.

In the *Oregon Lumber Co.* case the government sought to disaffirm and cancel a sale by it of public lands on the ground of fraud. It later sought to affirm the sale and claim damages. This Court said, at pages 294, 295:

> "Upon the facts stated, the sa' was voidable * * * and the plaintiff in error was entitled either to disaffirm the same and recover the lands, or affirm it and recover damages for the fraud. It could not do both. Both remedies were appropriate to the facts, but they were inconsistent, since the first was founded upon a disaffirmance and the second upon an affirmance

of a voidable transaction. * * * The rule is applicable to the Government in cases where patents have been procured by fraud. * * * Any decisive action by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based on one or the other of these inconsistent conclusions."

In the pending case the Court of Appeals repudiated this doctrine, saying: (opinion 256 Fed. 246, 705, 706).

"'The doctrine of election of remedies is not a rule of substantive law. It is a rule of procedure or judicial administration. It is technical * * *' See Brandeis dissenting in *United States v. Oregon Lumber Co.*, 260 U. S. 290, 304. It has been consistently criticized as harsh and not a favorite of equity."

* * * * *

"Whatever may be said for the common law doctrine of election of remedies before the advent of the Federal Rules of Civil Procedure, we are certain that there is no room for its application under applicable rules of procedure, * * *."

The Surplus Property Act, far from weakening the doctrine of election, specifically requires the United States to elect its statutory remedy.

The importance of the determination of the Court of Appeals that the Federal Rules of Civil Procedure have nullified the doctrine of election of remedies and estoppel is self-evident.

If the long established doctrine which has prevailed for generations, both in state and federal courts, is to be overturned in a case where the trial Court found that the equities overwhelmingly demand its application, it should be overturned only by a careful consideration by the Supreme Court itself of this important problem. Unless

certiorari is granted, one rule will prevail in the Tenth Circuit and the opposite in the other nine.

In 37 CJS, 354, §65, it is said:

> "One injured by fraud may elect to accept the situation and recover his damages or he may repudiate the transaction and seek to be placed in statu quo, but he cannot do both.
>
> "* * * The election must be promptly made, and when the election is once made, it is final and conclusive."

In Restatement of the Law on Restitution, p. 248, § 64, the author says:

> "An unreasonable delay in manifesting an avoidance of a transaction after the acquisition of knowledge of the facts terminates the power of recission for fraud or mistake, and the consequent right to restitution, if the interests of the transferee or of a third person are harmed or were likely to be harmed by such delay."

There is nothing in the law which exempts the government from these elementary rules of fair play.

In the pending case, much more was involved than the mere filing of the suit. There was the positive statement that the government exercised its election—"which election the United States makes and asserts" (R. 11)—to affirm and claim liquidated damages and the Court found grounds of estoppel, defendants having changed their position to their disadvantage by sale, putting it beyond their power to restore the heaters to the government.

In accord with *U. S. v. Oregon Lumber Co., supra,* 260 U. S. 290. See also *Robb vs. Vos,* 155 U. S. 13, 39 L. ed. 52, 15 S. Ct. 4; *Frisch v. Wells,* 200 Mass. 429, 86 N. E. 775; *Mintz v. Jacob,* 163 Mich. 280, 128 N. W. 211; *Blum v. Ingersoll,* 99 N. J. Eq. 563, 134 Atl. 176; *Davidson v. McKown,* 157 Kan. 217, 139 P. 2d 421; *Land v. Hall,* 167 S. E. 711 (Ga. App. 1933). See also *First National Bank v. Luther,*

217 F. 2d 262 (10th Cir. 1954); *North American Graphite Corp. v. Allen*, 184 F. 2d 387 (10th Cir. 1950); *Inland Waterways Corp. v. Doyle*, 204 F. 2d 874 (8th Cir. 1953); *Minneapolis National Bank v. Liberty National Bank*, 72 F. 2d 434, (10th Cir. 1934); *Tisdel v. Bank*, 90 Colo. 114, 130; *Holscher v. Ferry*, 131 Colo. 190, 280 P. 2d 655; 18 Am Jur.—Election of Remedies—§32, p. 152, 153; and a great mass of cases cited in a note in 6 ALR 2d, 23.

3.

The statute, regulations and certifications governing the exercise by the veteran of his priority were so vague and uncertain as to deprive the veteran and other defendants of due process of law in that neither the defendants nor the representatives of the War Assets Administration, from whom they sought advice in writing, were able to ascertain therefrom whether the contemplated purchase and resale were prohibited or permitted. They were therefore void, and in violation of due process of law.

The government attorney on p. 73 of the record stated:

> "These regulations are rather complex, your Honor, and difficult. Even attorneys have had difficulty trying to understand them."

This statement is amply sustained by the inability of the War Assets certification officers and regional legal counsel to advise defendants in reply to their written inquiries whether they could or could not legally carry through their proposal. It is confirmed by the sale and delivery of the heaters by War Assets after it was advised by defendants of the intended sale to Bernstein Corporation. It is further confirmed by the inability of the District Court and the Court of Appeals to agree on what certifications applied to the sale. The District Court relied on a certification that the Court of Appeals found applied only to purchases of such property as trucks and compressors,

which veterans bought for their own use. The Court of Appeals said it had no application to the challenged transaction* (Opinion p. 49 App.). The vagueness is confirmed also by the fact that both Courts relied on *Rex Trailer vs. U. S.*, 350 U. S. 148, 100 L. ed. 149, 76 S. Ct. 219, and *Daniel v. U. S.*, 234 Fed. 2nd 102 (5th Cir. 1956), "veteran front" cases" involving motor equipment saleable only for veteran's personal use and not for resale and so depending on wholly different certifications and representations than were appligable in this case where a different type of property governed by different regulations and certifications was bought for resale. The vagueness of the regulations and certificates is further confirmed by *Lee vs. U. S.*, 167 Fed. 2nd 137 (CA6) 1948, a war surplus case.

In referring to the application blanks, the Court says, 167 Fed. 2nd 140:

> "The printed language of the application blanks which appellants were required to sign was not only contradictory in certain parts, but did not conform to the rights granted veterans to purchase surplus Government property under the prescribed conditions. * * *
>
> "The certification blanks are obviously contradictory and confusing. It would be illogical to infer from them that appellants understandingly certified that they were not purchasing for resale surplus property of the United States which the law permitted them to resell.
>
> "It cannot reasonably be inferred that, in the promulgation of his regulations, the administrator intended to curtail rights which Congress had granted veterans by proscribing in fine print their resale privileges."

*Without the benefit of the representations of this inapplicable certification the findings of material misrepresentations of the District Court are without any basis.

That laws and regulations must, to be valid, be so clear and unambiguous that an ordinary person can know in advance how to avoid an unlawful course of action is a well settled principle of law.

In *Kraus & Bros. v. U. S.* 327 U. S. 614, 621, 90 L. ed. 894, 898, 66 S. Ct. 705, involving an alleged violation of price regulations, the Court held that, to be valid, the regulations must be so clear that the dividing line between lawful action and unlawful evasion is not left to conjecture.

In *Connally v. General Construction Co.*, 269 U. S. 385, 70 L. ed. 322, the Court held that this rule was "consonant alike with ordinary notions of fair play, and the settled rules of law, * * *." See also *Lanzetta v. New Jersey*, 306 U. S. 451, 83 L. ed. 888, 59 S. Ct. 618; *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 88 L. ed. 1488, 64 S. Ct. 1215, 153 ALR 1007; *U. S. v. Cohen Grocery Company*, 255 U. S. 81, 65 L. ed. 516, 41 S. Ct. 298; In Re *DeTorio*, 8 F. 2d 279 (N. D. Ill. 1925); a citizenship case; *Jordan v. DeGeorge*, 341 U. S. 223, 95 L. ed. 886, 71 S. Ct. 703, a deportation case; In Re *Tschoepe*, 13 F. Supp. 371 (S. D. Tex. 1936), holding the Frazier-Lemke Act void for indefiniteness; *Oertel v. Glenn*, 13 F. Supp. 651 (Kentucky 1936), affirmed 97 F. 2d 495.

4.

The Court's interpretation of the regulations, and the certificate promulgated by War Assets is erroneous and constitutes a judicial rewriting and extension thereof beyond its power and is a deprivation to defendants of due process of law. The regulations and certificate expressly authorize the veteran to resell without limitation the type of property involved in the challenged transaction. The Court legislates a non-existent prohibition that he cannot arrange the resale in advance of purchase.

The Supreme Court in a series of cases dealing with the sale of public lands to entrymen and to veterans on priority points out the limitations on the power to add to the statutory prohibitions.

In *United States v. Biggs*, 211 U. S. 507, 53 L. ed. 305, 29 S. Ct. 181, there was charged a conspiracy to defraud the United States by purchasing public lands in the names of defendants, ostensibly for their own use and benefit, but actually for the use and benefit of their corporate assignee, in an amount in excess of that which the corporation could lawfully obtain directly from the government. The money for the purchase was acquired by the entrymen from the corporation. The entrymen certified as required expressly by the statute:

> "That he does not apply to purchase the same on speculation but in good faith to appropriate it to his own exclusive use and benefit and that he has not directly or indirectly made any agreement or contract * * * by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself."*

The applicant made entry and before final action by the Land Department contracted to sell to the corporation. The Court held that the right of resale was unrestricted and could not be limited by implication. Said Mr. Justice White, speaking for the Court: (L. ed. 310)

> "It is insisted by the government that, however conclusive may be this ruling as to the power of the applicant to sell after application and to perfect his entry for the purpose of enabling him to perform such contract, that such ruling does not conclude the contention that a conspiracy formed to induce an entryman who has made his application to purchase, subsequently to agree to convey his interest in the land would be a violation of the statute. But we are constrained to say that this is a mere distinction without a difference."

*In the Surplus Property Act here involved there is no such limitation in the law, Regulations or certificates except as to trucks and other specified articles in scarce supply.

The Court says it is equivalent to claiming:

> "that it is unlawful under the statute to conspire to have that done which the statute did not prohibit." (L. ed. 311).

The attempt to extend the statute to make unlawful such a contract if made subsequent to application but prior to final entry was held ultra vires and void. To the same effect, *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 S. Ct. 163; *Webster v. Luther*, 163 U. S. 331, 41 L. ed. 179, 16 S. Ct. 963; (a veteran's preference case); *Budd v. U. S.*, 144 U. S. 154, 36 L. ed. 384, 12 S. Ct. 575; *Worden v. U. S.*, (CA6) 204 Fed. 1.

5.

The decision is in conflict with *Lee v. United States*, 167 Fed. 2nd 137 (CA6).

Lee v. United States, supra, is the leading case dealing with veterans' purchases for resale. In that case Singer was engaged in the steel jobbing business. His two sons-in-law purchased steel on veterans' priorities with money advanced to them by the father-in-law. The steel was shipped to the father-in-law's warehouse and was purchased by Singer from his sons-in-law at cost price. He resold it at a profit, 65% of which he returned to the veterans. The Government charged that they bought ostensibly for their own use and benefit but actually for the use and benefit of their father-in-law.

In reversing a conviction by the lower court for engaging in a trick, scheme or device to obtain the priority, the Court held that one of the purposes of the War Surplus Act was to aid veterans in the acquisition of surplus property, to establish and maintain their own small business, and that they were well within the purposes of the Act. Said the Court (p. 139):

> "Before Lee and Leventhal filed their respective applications for veteran's priority certificates, Singer

agreed to advance or lend them the money with which to make the purchases of steel, and to furnish space in his warehouse for storage of the commodity. The veterans paid for their purchases by their own personal checks, but Singer supplied them with the necessary funds. • • •

"The steel bought by the veterans was shipped to Singer's warehouse, where it was stored in separate compartments for the respective accounts of Lee and Leventhal." • • •

6.

There is not sufficient evidence to sustain the finding of a fraudulent conspiracy, either in fact or in law.

There can be no conspiracy between a corporation, its officers, directors, and employees where said officers, directors, and employees are acting for the benefit of the corporation. The decision of the Court of Appeals is in conflict with decisions of other Circuit Courts of Appeal as set forth in *Nelson Radio & Supply Co. v. Motorola*, 200 F. 2d 911 (C. A. 5, 1952), cert. denied 345 U. S. 925, 73 S. Ct. 783 (1953), and *McKay v. Sears Roebuck & Co.*, 237 F. 2d 869 (C. A. 7, 1956), writ dismissed 355 U. S. 865, 78 S. Ct. 114 (1957).

The decisions of both the trial court and the Court of Appeals are firmly anchored to the existence of a combination, agreement or conspiracy among the defendants to defraud the United States.

In its opinion the Court of Appeals, relying upon the trial court's Finding of Fact No. 10, stated:

"'The trial court's judgment is based upon an ultimate finding to the effect that in the Fall of 1946, the appellants entered into an agreement or conspiracy to defraud the United States in connection with the sale of surplus property of the United States in San Antonio, Texas, by arranging to have war veteran Bensik, an

employee of Bernstein Brothers, Inc., apply for a veteran's priority certificate for the the purchase of the property in question, ostensibly in his own behalf, for use in his own business, but actually in behalf of and for the benefit of Bernstein Brothers, the purpose and object being to enable the Company to gain possession and control of priority surplus property which, for lack of such priority, it would not be entitled or eligible to obtain."

The trial court in its findings found that Bernstein Bros. Pipe & Machinery Company was a Colorado corporation and that all of the individual defendants were either officers, directors, co-owners; or employees of that corporation. (See trial court's Finding No. 3.) Bensik, employed by the corporation as a salesman, also did business as Modern Specialty Distributors. The trial Court found:

"Defendant Modern Specialty Distributors was a business enterprise organized by defendant Albert Bensik and engaged in the mail order business."

There was no finding of a partnership. According to the Court of Appeals, all of Bensik's acts, although ostensibly for his own behalf, were actually for the benefit of the Bernstein Bros. corporation. (See the Court of Appeals decision, page 3, quoted hereinbefore, and the trial court's Finding No. 10.)

The trial court made numerous Findings of Fact, all bottomed on conspiracy. (See Trial Court's Findings Nos. 10, 11, 12, 13 and 15.)

There are no findings of the trial court upon which any liability of any of the individual defendants may be predicated, except by the findings of the trial court of the existence of a conspiracy, which findings were concurred in by the Court of Appeals opinion, as set forth in the Appendix.

A corporation cannot conspire with itself or with its own officers, directors, agents, or employees acting for the

benefit of the corporation. *Nelson Radio & Supply Co. v. Motorola* and *McKay v. Sears Roebuck & Co., supra.*

If the government takes the position, as did the Court of Appeals, that the defendant Bensik was acting for the Bernstein Brothers corporation, then the instant proceeding falls squarely within the rule enunciated in *Nelson Radio v. Motorola* and *McKay v. Sears Roebuck & Co., supra.*

On the other hand, if the government disavows that position and states that Bensik was acting for himself and for his own benefit, then what he did was not only within the regulations and the statutes but his acts, even if deemed to be unlawful, could not then be chargeable against any of the other defendants who are bound by his acts only as participants in a conspiracy.

In view of the Circuit Court's holding, which is in conflict with *Nelson Radio & Supply Co., supra,* and *McKay v. Sears Roebuck, supra,* one in the Fifth Circuit and one in the Seventh Circuit, there is a conflict in the Circuits and the defendants submit that the petition for certiorari should be granted.

The decision works a grave miscarriage of justice by placing the stigma of fraud and the heavy penalties of the statute on defendants who disclosed to War Assets in advance of purchase, the veteran's intent to sell to his employer and sought its advice as to the validity of the proposed transaction.

There could be no fraud since the government was not deceived. 37 CJS, p. 267, §27.; *Roosevelt v. Missouri State Life Insurance Co.*, 78 F. 2d 752 (CA 8); *Ming v. Woolfolk*, 116 U. S. 599, 29 L. ed. 740, 6 S. Ct. 489; *International Harvester Co. v. Rieke*, (CCA 8) 9 Fed. 2nd 776;

If certiorari is granted we will further develop this point.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

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APPENDIX

OPINION OF UNITED STATES DISTRICT COURT

149 FED. SUP. 568

KNOUS, Chief Judge.

The plaintiff instituted this action by filing a complaint charging the defendants with having engaged, in violation of the Surplus Property Act of 1944, 50 U.S.C.A. Appendix § 1611 et seq., in a fraudulent trick, scheme, or device for the purpose of obtaining, or aiding in obtaining surplus property from the War Assets Administration.

The case was tried to the Court and thereafter briefs were submitted by the parties.

On plaintiff's motion, at the conclusion of its case the action was dismissed as against the defendant Abe Bernstein.

[1] As to the defendant Rose Levy, the Court is of the opinion that the Government has failed to produce sufficient evidence to establish any participation by her in the alleged fraudulent trick, scheme or device, or any connection therewith, and accordingly the action will be dismissed as to the defendant Rose Levy.

[2] The Court is satisfied from the evidence adduced at the trial that the remaining defendants in the manner and form alleged in the complaint, used, or engaged in, or caused to be used and engaged in a fraudulent trick, scheme, or device for the purpose of receiving or obtaining, or aiding to receive or obtain surplus from the United States, and entered into an agreement, combination, or conspiracy to do the same and as a result of such action were successful in obtaining priority surplus property from the United States to which they were not entitled, all in violation of the Surplus Property Act of 1944 and the regulations promulgated thereunder, as a consequence of which the issue of liability must be resolved in favor of plaintiff.

In the Court's view no helpful purpose would be served by a recital of the evidence, of considerable volume, which impels the foregoing conclusion of liability on the part of the remaining defendants. However, a determination of the amount of the recovery to which the Government is entitled necessitates some analysis of the pleadings and record as well as the pertinent law.

By its original complaint, filed February 28, 1950, the Government alleged the defendants:

> "are liable at the election of the United States (and which election the United States hereby makes and asserts) to pay to the United States as liquidated damages, a sum equivalent to twice the consideration agreed to be given to the War Assets Administration for the property obtained."

Computed on this basis the maximum recovery allowable would be $39,912.00.

The defendants, on October 24, 1950, filed their Answer to the Complaint.

On July 3, 1951, the plaintiff filed a Motion for Leave to File Amended Complaint, alleging in part therein:

> "that it has, and since the filing of the original complaint, apparently come to the attention of said Department of Justice that the defendants Bernsteins have made a very large profit from the sale of the heaters alleged to have been fraudulently acquired by them; that if the charges in the complaint be established, said Bernsteins will be liable to the plaintiff for said profits, greatly enhancing the amount to be recovered. * * *"

Thereafter, on January 2, 1952, an Amended Complaint was filed by which the Government sought relief by praying for the restoration of the merchandise or for damages for the cash returns or proceeds of the sale. Damages were also sought in the amount of twice the consideration paid

the plaintiff for the merchandise. Answer was made to this Complaint March 10, 1953.

Thereafter, on April 16, 1954, the plaintiff filed a Motion to Amend the Complaint again. The motion was granted, and by its Second Amended Complaint the plaintiff sought, in effect, three forms of relief, viz.:

1. Restoration of the propert, or the cash returns or proceeds of the sale of the property;

2. Twice the consideration paid the plaintiff for the merchandise;

3. $2,000 plus twice the amount of damages which the plaintiff might have sustained in the sale.

Answer was made to this Complaint October 6, 1954. On the same date the defendants filed their Motion to Compel Election in Accordance with Original Complaint. This Motion was denied by Order of March 1, 1955, which also ordered the Government to elect upon one mode of relief. On April 29, 1955, the Government elected the following:

> "That judgment be entered in its favor against defendants for restoration to the United States of the aforementioned property; and with respect to any articles which have been resold under circumstances making return impossible, judgment for the proceeds of such sales, less the amount paid the plaintiff, together with interest and costs."

The Amended Answer to Second Amended Complaint, filed February 27, 1956, set forth as a defense the election by the plaintiff made in its original complaint.

By 40 U.S.C.A. § 489, those committing such violations as are the subject of this action:

> "(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit; or

"(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or

"(3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be."

The plaintiff, apparently made its election under 40 U.S.C.A. § 489(d) which provides:

"The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law."

for it is stated on page 3 of the Government's brief:

"* * * plaintiff * * * elected to proceed under the common law (and) or equitable court. * * *"

[3] The theory of the Government seems to be that 40 U.S.C.A. § 489(d) provides remedies known to the common law and/or equity and, thus it proceeds on the proposition that there arose a constructive trust upon the fraudulent vendee and that, therefore, the plaintiff vendor is entitled to the doctrine of "pursuit of trust funds." Whatever difficulty there may be in the first instance in interpreting the phrase "provided by law" as it appears in 40 U.S.C.A. § 489(d), or in the second instance the ability of the plaintiff to sufficiently identify the trust funds, is made immaterial by the fact that it must be held that the plaintiff elected its remedy in its original complaint by seeking "a sum equivalent to twice the consideration agreed to be given to the War Assets Administration for the property obtained * * *"

It is said in 18 Am.Jur., Election of Remedies, § 3, pg. 129, that:

> "An election of remedies may be defined as the choosing between two or more different and coexisting modes of procedure and relief allowed by law on the same state of facts. The doctrine is applicable where an aggrieved party has two remedies by which he may enforce inconsistent rights growing out of the same transaction and, being cognizant of his legal rights and of such facts as will enable him to make an intelligent choice, brings his action by one of the methods. Under such circumstances, the law says he shall not thereafter adopt the alternative remedy, for a suitor cannot pursue a remedy which predicates his case upon one theory of right and thereafter seek a remedy inconsistent with such prior proceeding * * *"

[4] It is clear that the doctrine applies to the Government, albeit, in some instances, with caution. *United States v. Oregon Lumber Co.*, 1922, 260 U.S. 290, 43 S.Ct. 100, 67 L.Ed. 261; *Vestal v. Commissioner of Internal Revenue*, 1945, 80 U.S.App.D.C. 264, 152 F.2d 132; *Goldstein v. United States* 8 Cir., 1955, 227 F. 2d 1.

One of the most frequent applications of the doctrine is where a litigant seeks to affirm or disaffirm a contract or transaction and later seeks to disaffirm or affirm the same contract or transaction. *Cf. Minneapolis National Bank of Minneapolis, Kan. v. Liberty National Bank;* 10 Cir., 1934, 72 F.2d 434; *Sylvania Industrial Corporation v. Lilienfeld's Estate*, 4 Cir., 1943, 132 F.2d 887, 145 A.L.R. 612; *Walker v. L. Maxcy Inc.*, 5 Cir., 1939, 103 F.2d 24, certiorari denied 308 U.S. 564, 60 S.Ct. 76, 84 L.Ed. 474; *Plymouth Village Fire District v. New Amsterdam Cas. Co.*, D.C.N.H., 1955, 130 F.Supp. 798; *Sanders v. Meyerstein* D.C.N.C. 1954, 124 F. Supp. 77; *Tisdel v. Central Savings Bank & Trust Co.*, 1931, 90 Colo. 114, 6 P.2d 912; *Holscher v. Ferry*, 1955, 131 Colo. 190, 280 P.2d 655, 28 C.J.S., Election of Remedies, § 6, p. 1070.

In this instance the Government, by its original complaint sought to affirm the transaction by seeking liquidated damages as provided by the statute. By its subsequent election, it sought to disaffirm the transaction by seeking restoration of the property or the proceeds of its sale where return was impossible.

[5] It must, however, be recognized as a general rule that an original complaint will not constitute an election precluding a prayer for an inconsistent remedy in an amendment. 28 C.J.S., Election of Remedies, § 20, p. 1096.

However, if the doctrine of election of remedies is not applicable here, it would be hard to conceive of an instance where it would be. Its application does not have to be found in inference or interpretation, for the Government positively stated in its original complaint that it was making and asserting its election. That was done on February 28, 1950. The transactions complained of took place in late 1946. The investigation of the transaction by the War Assets Administration was initiated in February, 1947. During the month of February, 1947, Mr. Poyen, the investigator, ascertained that Mr. Bensik had obtained a loan from Mr. and Mrs. Levy for the purchase of the heaters and that he had sold 510 of the heaters to the Bernstein Brothers Pipe and Machinery Company for $35.00 each. Mr. Bensik disclosed a mark-up that indicated he was planning to sell some of the heaters at $425. He told Mr. Poyen that he had sold a few at prices in excess of $200. As early as December 26, 1946, the Bernsteins were offering the heaters in a national trade magazine for $330.

With these facts attending it is inconceivable that the Government was not apprised of the profits which the Bernsteins were making or could make on the resale of the heaters. The election which they did make on April 29, 1955 could have been made in the original complaint, and if it was to be made at any time should, in good conscience, have been made then.

To overcome their positive election in the original complaint the Government advances the following:

(a) That the matter has already been litigated when the Court ruled adversely to the defendants on their motion to compel the Government to elect as in its original complaint. The answer to this is that the defense of election of remedies is an affirmative defense to be pleaded in answer. *Kuhl v. Hayes*, 10 Cir., 1954, 212 F.2d 37; *Bagwell v. Susman*, 6 Cir., 1947, 165 F.2d 412. Moreover, the Government's motion to strike from the Amended Answer to Second Amended Complaint the defense of election of remedies on the ground that it had already been litigated, was denied.

(b) That as a matter of public policy the doctrine should not be applied in this case. The answer to this is that the very remedy which the Government sought and elected upon in its original complaint was one of the remedies which Congress must have deemed a vindication of public policy for violations of the Act. To restrict the Government then to a remedy of their own choosing, which remedy is in fact a vindication of public policy, could hardly be conceived as being in derogation of public policy.

(c) That there was no reliance by the defendants on the original remedy sought and that there was no substantial damage to them as a result of the last election.

Using the Government's own figures (as appearing in their brief) in regard to this matter, they evidence that prior to the original complaint the defendants had sold a quantity of the heaters and parts for $96,677.28, constituting 69 per cent. of the total gross return. Between the original complaint and the filing of the motion to amend the complaint, July 3, 1951, the defendants sold $10,935 worth of heaters and parts, and that thereafter they sold $33,541.96 worth. The last heater was sold in March, 1955. [The final election took place in April, 1955].

From these facts the Government concludes that the sales prior to the filing of the original complaint in 1950 are immaterial. It is then stated that due to the motion of the Government filed July 3, 1951, to amend the complaint, which motion alleged that the Government had been appraised of the fact that the Bernsteins had made a very large profit on the sale of the heaters and that if fraud were established the defendants would be liable to the Government for such profits, that the defendants were given notice of the Government's intention to seek such profits, but continued to sell the heaters thereafter, so that their only damage would be their business or selling expenses relative to the sale of $10,935 worth of heaters between the original complaint and the filing of the motion to amend.

However, when the amended complaint was in fact filed on January 2, 1952, the Government did not elect but incorporated a prayer for both forms of relief, proceeded in the same manner in its second amended complaint, and elected on April 29, 1955, only after court order to do so.

Thus, it is contended by the Government, after having followed a practice of burning the candle at both ends for a period slightly short of four years, that the defendants should be penalized for failing to guess which mode of relief the Government would finally adopt and during the entire period curtail their business in selling slow-moving merchandise accordingly. Suffice it to say that there appears in the record ample damage to the defendants upon which the doctrine of election of remedies may rest.

The Government, having made a positive election, by its own statement in its original complaint, should now be bound by such election, and be limited to damages in the amount of $39,912 plus costs. Accordingly, it is

Ordered that within thirty (30) days from this date counsel for plaintiff prepare and serve findings of fact and conclusions of law and judgment in conformity here-

with. If stipulation as to the form thereof cannot be reached, settlement may be submitted to the Court on notice.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on for trial before the Court, without a jury, on the 20th day of August, 1956, a trial by jury having been waived by the parties, and the Court having considered the pleadings, the evidence, and being fully advised in the premises, hereby makes the following findings of fact and conclusions of law, to wit;

FINDINGS OF FACT.

1. This is a civil action brought by the United States of America as plaintiff under Section 1345 of the Judicial Code, 28 U.S.C. § 1345, and Section 26 (b) of the Surplus Property Act of 1944, 58 Stat. 765, 50 U.S.C.A.Appendix, § 1635(b), of which the Court has jurisdiction under Section 26(c), 50 U.S.C.A.Appendix, § 1635(c) (repealed and re-enacted as Section 209(b) and (c) of the Federal Property and Administrative Services Act of 1949, 63 Stat. 392, 399, 40 U.S.C.A. § 489(b) and (c)).

2. The defendant Bernstein Bros. Pipe and Machinery Company was at all times herein pertinent a Colorado corporation engaged in the pipe and machinery business, with its principal offices located in Pueblo, Colorado.

3. At all times herein pertinent, the individual defendants Bernstein were officers, directors and co-owners of the company, defendant Maurice Levy was an executive employee in said company, defendant Rose Levy is, and was, the wife of the said Maurice Levy, and sister of defendants Sam and Abe Bernstein; defendant Albert Bensik was an employee of the company in the capacity of salesman; defendant Modern Specialty Distributors was a business enterprise organized by defendant Albert Bensik and engaged in the mail order business.

4. During the fall of 1946, pursuant to the Surplus Property Act of 1944, as amended, and Rules and Regulations promulgated thereunder, the United States, acting through the War Assets Administration, was engaged in the disposition of surplus property at San Antonio, Texas; pursuant thereto, on or about October 31, 1946, the War Assets Administration announced Special Offer No. 58 for the sale of 928 heaters manufactured by the Herman Nelson Corporation, and 3,341 heaters manufactured by the Stewart-Warner Corporation; the offer contained the following provision:

> "This property is offered concurrently to all priority groups, including veterans of World War II and all levels of trade on a Sealed Bid basis. Priority groups will bid without indicating a price, and awards will be made to priority groups at the lowest acceptable price."

The offer recited that sealed bids would be received until 5:00 p. m., November 20, 1946, and opened publicly at 2:00 p. m., November 21, 1946, at the San Antonio Regional Office, Texas.

5. Among those bidding for the heaters were the defendant Bernstein Bros. Pipe and Machinery Company, which bid on all 4,269 heaters, the Herman Nelson Corporation, which bid upon the 928 Herman Nelson heaters, and defendant Albert Bensik, who bid for $20,000 worth of heaters without specifying the category. The high bids received were $33.26 per unit on the Herman Nelson heaters, $22.37 on the Stewart Warner heaters, both of which were submitted by Bernstein Bros. Pipe and Machinery Company. On December 10, 1946, the sale was consummated and awards made. Albert Bensik, on the basis of his veteran's priority, the details concerning which will be treated below, was awarded 600 of the Herman Nelson heaters at $33.26 per unit, or at a total purchase price of $19,956. The remaining heaters of the original 928 were awarded, initially, 282 to defendant Bernstein Bros. Pipe and Machinery Company, and 45 to one Harry P. Cohen. The Herman

Nelson Corporation, however, which as aforesaid, was also a bidder for the heaters and which held a small business priority, protested the award of 282 heaters to the Bernstein Bros. Pipe and Machinery Company, which had no priority whatsoever. Following the protest, the said 282 heaters were re-awarded to the Herman Nelson Corporation. The initial award to Bernstein Bros. Pipe and Machinery Company, the protest and the re-award all occurred upon the same day, December 10, 1946.

6. In connection with the concurrent sale of the 3,341 Stewart Warner heaters, which are not in issue in this case, all except 510 of said heaters were claimed by and awarded to veterans holding priorities at $22.37 per unit. The remaining 510 heaters were sold to Bernstein Bros. Pipe and Machinery Company, also at $22.37 per unit.

7. Immediately after the award of the 600 Herman Nelson heaters to defendant Bensik, the said heaters were shipped to Modern Specialty Distributors, c/o American Warehouse, Pueblo, Colorado, which warehouse was owned by the defendant Bernstein Bros. Pipe and Machinery Company and wherein defendant Bensik had previously rented some space. Shipping arrangements were handled by defendant Sam Bernstein, who was in San Antonio, Texas, at the time, and the freight costs were borne by the defendant Bernstein Bros. Pipe and Machinery Company. Subsequently, Bernstein Bros. Pipe and Machinery Company billed Bensik for the freight cost allocable to 90 Herman Nelson heaters, which, as will be explained later, were retained by the said Bensik.

8. In connection with defendant Bensik's certification as a veteran priority claimant, it appeared that Bensik had applied initially for a veterans' priority certificate on October 30, 1946. In this application, Bensik requested six Gasoline Engine Driven Federal Compressors, Stock No. 66—C—1175. Later, on November 19, 1946, he cancelled this request, and asked to be re-certified for $25,000 worth

of surplus property, including $20,000 worth of "Heating and Ventilating Machines and Equipment, Texas".

9. In the said application, Bensik represented and certified (1) that the property was to be used as initial stock for resale in his merchandising business, the Modern Specialty Distributors, (2) that he was the sole investor in the enterprise, (3) that he had invested $3,000 in the same, (4) that he had a net worth of $45,500, including $28,000 in cash, (5) that he was not a broker, nor would he use the property ordered to operate as a broker, (6) that he was not purchasing the property for the use and benefit of any other enterprise, dealer, broker, merchant or other undisclosed partner or principal, (7) that he would not engage in a "drop sale" in his disposition of the property. On the basis of these representations Bensik was duly certified by War Assets Administration as a priority purchaser for the equipment in question.

10. Sometime before November 19, 1946, the defendants herein (with the exception of Abe Bernstein, who on motion of plaintiff was dismissed as a defendant at the close of the Government's case, and Rose Levy as to whom the action has been dismissed by reason of insufficient evidence) entered into an agreement, plan, scheme, combination or conspiracy to defraud the United States in connection with the mentioned War Assets Administration surplus sale at San Antonio, Texas, by arranging to have defendant Bensik, who was in the employ of the Bernstein Bros. Pipe and Machinery Company, to apply for a veterans priority certificate for the property in question, ostensibly in his own behalf for use in a business to be conducted by him, but actually in behalf, and for the benefit and advantage of Bernstein Bros. Pipe and Machinery Company, the purpose and object being to enable said company to gain possession and control of priority surplus property, which because of lack of priority, it was not entitled to, or eligible for. To accomplish this purpose, the following means were to be employed:

(a) Defendant Bensik was to make application for a veterans priority certificate for approximately $20,000 worth of surplus heaters then being offered by War Assets Administration at San Antonio, Texas, and to make the necessary and required representations in said application, as more specifically set forth in Paragraph 9 above, although in fact, and as the defendants well knew, all of the said representations were false and fraudulent.

(b) The $20,000 in funds necessary to complete the purchase was to be supplied to defendant Bensik in the following manner. Defendant Maurice Levy, the $25,000 per year general manager of the Bernstein Bros. Pipe and Machinery Company, was to turn over to his wife, defendant Rose Levy, $20,000 on the basis of a purported loan; the latter in turn was to deliver the said $20,000 to defendant Bensik, also on the basis of a loan.

(c) It was agreed further that the property, immediately upon being awarded to Bensik by War Assets Administration, was to be delivered forthwith to the American Warehouse, Pueblo, Colorado, which was owned by defendant Bernstein Bros. Pipe and Machinery Company; that Bensik would transfer title to approximately 85 per cent of the property to the defendant Bernstein Bros. Pipe and Machinery Company, this to be evidenced by a contract of resale, wherein Bensik was to receive a profit of from 75¢ to $2 per unit.

(d) It was agreed also that Bensik would then use the proceeds derived from the resale to the defendant Bernstein Bros. Pipe and Machinery Company to liquidate the $20,000 loan from Rose Levy, who upon receipt of such amounts would transmit the same to her husband, Maurice Levy, in repayment of the loan from him to her.

(e) As for the 15 per cent of the units to be retained by defendant Bensik, the latter was to dispose of the same in the name of his company, the Modern Specialty Distributors, and that 45 per cent of the profits derived from said resale, were to be turned over to defendant, Rose Levy.

11. The basic purpose of the conspiracy was to enable defendants to circumvent the rules, requirements, restrictions and conditions of the Surplus Property Act, and regulations promulgated thereunder, and to permit defendants to obtain priority surplus property for which they were not eligible.

12. Pursuant to the agreement, plan, combination and conspiracy mentioned in Paragraph 10 above, and in order to effectuate the same, defendants (with the exception of the two defendants as to whom the action has been dismissed) employed all the means, methods, procedures and the courses of action outlined in Paragraph 10(a) through (e) above, and as a result were able to obtain from War Assets Administration 600 Herman Nelson priority surplus heaters to which they were not entitled, and which, except for the deceit, fraud, misrepresentation and corrupt practices employed, they would not have been able to obtain.

13. Pursuant to the conspiracy aforesaid, Bensik transferred to the defendant Bernstein Bros. Pipe and Machinery Company at $35 per unit 510 of the 600 units obtained from War Assets Administration, and retained 90 of said units for use in his own business; the Modern Specialty Distributors. Defendant Bensik received a gross profit of $887.40 on the mentioned 510 units transferred to defendant Bernstein Bros. Pipe and Machinery Company, of which 45 per cent or $399.33 was turned over, pursuant to the agreement or conspiracy, to Rose Levy. Accordingly, Bensik's profit on the 510 units transferred to Bernstein Bros. Pipe and Machinery Company totalled $488.07 or 96¢ per unit. As for the profits derived on the 90 units retained by defendant Bensik and resold in the name of his company, the Modern Specialty Distributors, 45 per cent of the profits totaling approximately $24,000 was turned over to Rose Levy.

14. Defendant Bernstein Bros. Pipe and Machinery Company resold, either in original or cannibalized form, the 510 units transferred to it by defendant Bensik at sums

ranging up to $450 per unit and in all received a total gross return thereon of $141,154.24.

15. As a result of the activities above described, defendant Bensik, with the aid, assistance and connivance of, and pursuant to a conspiracy with, the remaining defendants (with the exception of the two defendants as to whom the action has been dismissed) not only violated his business-use certification, whereby he was enabled initially to obtain the property from War Assets Administration, and upon which War Assets Administration relied, but intended to so violate from the inception, and did so for the purpose and with the objective of defrauding the United States.

16. The Government, by its original complaint, filed February 28, 1950, elected to pursue the remedy set forth under Section 26(b) (2) of the Surplus Property Act of 1944, as amended, which provides for payment by the wrongdoer of a sum equal to twice the consideration agreed to be given by such person to the United States for the property obtained. Computed on this basis the recovery allowable would be $39,912.

17. The Government, by later amendments to the original complaint, purported to expand its claim for relief by seeking to recover the gross proceeds realized by defendants upon resale of the property in question.

However, as appears from the Court's Memorandum of Opinion and Order dated February 20, 1957, since the Government in its original complaint elected to affirm the transaction by seeking the liquidated statutory damages aforesaid, it is bound by such election, and cannot later, in effect, disaffirm the transaction and elect to pursue either return of the property or the gross proceeds derived from resale thereof.

CONCLUSIONS OF LAW

From the foregoing facts, the Court makes the following conclusions of law:

1. This Court has jurisdiction of the parties and subject matter of this action.

2. That the Memorandum of Opinion and Order of this Court dated February 20, 1957, is made a part of said findings of fact and conclusions of law.

3. That the complaint herein be dismissed with prejudice as to defendants Abe Bernstein and Rose Levy.

4. That the defendants (with the exception of defendants Abe Bernstein and Rose Levy) used or engaged in or caused to be used or engaged in a fraudulent trick, scheme or device for the purpose of receiving or obtaining, or aiding to receive or obtain, surplus property from the United States, and entered into an agreement, combination or conspiracy to do the same, and as a result of such action were successful in obtaining priority surplus property from the United States to which they were not entitled, all in violation of the Surplus Property Act of 1944, and regulations promulgated thereunder.

5. Accordingly, plaintiff, the United States of America, is entitled to recover of and from the defendants (except for the two defendants above-mentioned) jointly and severally, the sum of $39,912 plus costs.

OPINION OF UNITED STATES COURT OF APPEALS

256 FED. 2ND 697

MURRAH, Circuit Judge.

[1] This is an appeal from a civil judgment in a suit by the United States against the appellants and others under the fraud provisions of the Surplus Property Act of 1944, 58 Stat. 765, 780, now Section 209(b), Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 392, 40 U.S.C.A. § 489(b).

On the critical dates of the complaint, Section 26(b) of the 1944 Act provided in substance that every person who

engages in any fraudulent scheme or device for the purpose of securing or obtaining any surplus property of the United States, or who agrees or conspires to do so, shall be liable to the United States for enumerated elective remedies. Jurisdiction of suits under the Act was vested in the United States. Section 26(c).

The trial court's judgment is based upon an ultimate finding to the effect that in the Fall of 1946, the appellants entered into an agreement or conspiracy to defraud the United States in connection with the sale of surplus property of the United States in San Antonio, Texas, by arranging to have war veteran Bensik, an employee of Bernstein Brothers, Inc., apply for a veteran's priority certificate for the purchase of the property in question, ostensibly in his own behalf, for use in his own business, but actually in behalf of and for the benefit of Bernstein Brothers, the purpose and object being to enable the Company to gain possession and control of priority surplus property which, for lack of such priority, it would not be entitled or eligible to obtain.

The underlying facts are that appellant, Bensik, a war veteran doing business as the Modern Specialty Distributors in Pueblo, Colorado, was distributing grave monuments and other odds and ends, including some reconditioned Stewart-Warner airplane heaters. Appellant, Bernstein Brothers Pipe and Machinery Company, is a large established retail and wholesale dealer in both new and used pipe and machinery in Pueblo. The individual appellants, Bernsteins, are officers and principal owners of the corporation. Appellant, Levy, is a brother-in-law of the corporation president, and General Sales Manager of the company. Bensik started working for the corporation as a salesman in February 1946 for $250 per month, but continued to conduct his own small business on the side. On October 20, 1946, Bensik made an application and was certified by the War Assets Administration in Denver, Colorado, for a veteran's priority to purchase $3,000 worth of

gasoline engine compressors. In his application, he represented that no person other than himself had any proprietary interest in his enterprise in excess of fifty percent of the invested capital or of the gross profits or income thereof; that he was not a broker, and would not handle the surplus property as a broker; and was not purchasing the property for the use and benefit of any other enterprise, dealer, broker, merchant or other undisclosed partner or principal.

About the time of his application and certification for the engine compressors, the War Assets Administration offered 928 Herman Nelson airplane heaters and 3341 Stewart-Warner heaters for sale as surplus property in San Antonio, Texas. The property was offered concurrently to all priority groups, including World War veterans, and all levels of trade—all priority groups to bid without price, awards to be made to priority groups at the lowest acceptable price. With notice of this offering, Bensik returned to the War Assets Administration office in Denver on November 18 or 19, and asked to be recertified for $25,000 worth of surplus property, including $20,000 worth of "heating and ventilating equipment and machinery—Texas". At the same time, he submitted a letter from a Pueblo bank stating that he was a legitimate dealer and wholesaler of equipment and supplies, and had on deposit with the bank at that time $25,000. The bank credit was arranged by appellant Levy, who gave the bank his personal check for $25,000 in exchange for a cashier's check for that amount "payable to ourselves" for Bensik's account. Previously, and on October 31, Bernstein Brothers issued its check to Levy for $21,532 in payment of his annual salary, less taxes, and Levy apparently financed the transaction with this check and another from Morey Bernstein in the sum of $7,500, which was never honored. In connection with his application for the recertification, Bensik submitted a grossly exaggerated financial statement in which he listed $28,000 in cash, evidently including the $25,000 bank credit represented by the cashier's check. He also

certified in connection with this priority application that he had made necessary arrangements to become "an established dealer, jobber or distributor of the kind who customarily take into their possession and have full control for the purpose of reselling property of the kind covered by this order"; that he was not a broker and would not use the property ordered to operate as such; and that he would not engage in "drop sale" in his disposal of the property.

On the basis of these latter representations, Bensik's application was reviewed and he was recertified for the purchase of $20,000 worth of the heating and ventilating equipment as a specialty distributor. The original application was stamped "initial stock for resale". On the next day after the last certification the $25,000 cashier's check was re-deposited to Levy's account. He thereupon issued a check to his wife for $20,000 and she secured a cashier's check for $20,000 "payable to the order of ourselves December 13, 1946". This check was left with the bank for Mr. Bensik. The check to Levy's wife (Bernstein's sister) was a loan to finance the Bensik transaction.

On December 10, Bensik was awarded 600 Herman Nelson heaters at a unit cost of $33.26, or a total sum of $19,956. The awards were made on the basis of Bernstein Brothers' non-priority highest best bid on the whole offering of both the Herman Nelson and Stewart-Warner heaters. Bensik did not go to San Antonio and never examined the heaters before bid or purchase, but appellant, Sam Bernstein, was in San Antonio to bid on the heaters without priority. While there, Bernstein, in a chance conversation with a stranger, later discovered to be a bidding competitor, unwittingly stated that he was working through Mr. Bensik, and inquired whether the stranger "would be interested in purchasing for companies."

After the award of the heaters to Bensik, Sam Bernstein arranged to have them shipped to Bernstein Brothers warehouse in Pueblo and paid the freight. On December 13, 1946, three days after the award of the heaters to

Bensik, and before arrival at the Bernstein Brothers warehouse, Rose Levy and Bensik entered into an agreement, by direction of her husband, Maurice Levy, under which Rosy Levy agreed to loan Bensik $20,000, to be used for the purchase of the 600 heaters. It was agreed that the merchandise would be shipped to Pueblo and stored in the Bernstein warehouse; that Bensik would proceed to sell the heaters, and after payment of all charges, the proceeds would be applied toward the repayment of the $20,000 loan, plus interest. The remainder of the proceeds were to be divided between the parties, forty-five percent to Levy and fifty-five per cent to Bensik. It was agreed that all of the proceeds from the sale would be placed in an account known as the Levy-Bensik special account, and that all checks written on such account would be signed by both parties. It was to be distinctly understood that the parties did not intend by their agreement to constitute a partnership, but that the moneys provided to be paid to Levy over and above the loan should merely constitute "interest and return on said loan." Bensik executed his note to Rose Levy for the $20,000 loan. The $20,000 cashier's check was thereupon deposited in a new account for the Modern Specialty Distributors, and a check was drawn on this account by Bensik to the Treasurer of the United States in payment of the heaters previously awarded to him.

On December 24, and before arrival of the merchandise in Pueblo, Bensik formally agreed in writing to sell Bernstein Brothers 510 of the heaters at $35 each f. o. b. San Antonio, payment to be made as delivery to the Bernstein warehouse was completed. The 510 heaters were duly transferred to Bernstein Brothers for a profit of $1.74 per unit to Levy and Bensik, netting Bensik $488.70. Bernstein Brothers finally sold the 510 heaters for a gross price of $141,154.24, or an average price of $276 each. Bensik advertised and eventually sold the remaining 90 heaters for a total profit of $24,000, which he divided with Rose Levy in accordance with their contract.

During this time, Bensik purchased from Bernstein Brothers the smaller and less expensive, Stewart-Warner heaters for $125 each and resold them for $195, and the government emphasizes this disparity in purchase and sale of heaters as evidence of the lack of the bona fides of the whole transaction.

[2] The property in question was awarded to Bensik on the basis of his veteran's priority, for which Bernstein Brothers was ineligible. And, it would undoubtedly be contrary to the spirit and purpose of the Surplus Property Act and actionably wrong, to use Bensik's priority to obtain the property on behalf and for the benefit of Bernstein Brothers. *Rex Trailer Co. v. United States*, 350 U. S. 148 76 S.Ct. 219, 100 L.Ed. 149; *Daniels v. United States*, 5 Cir., 234 F. 2d 102. Indeed, the gist of the government's claim is that the parties conspired to use Bensik's priority to secure or obtain property for Bernstein Brothers. But appellants earnestly insist that Bensik purchased the property in his own right for his own account; that the subsequent sale of the major portion of it to Bernstein Brothers was not prohibited by any applicable regulation, and was moreover with the knowledge and tacit consent of the War Assets Administration. In other words, the sale was "real and not a sham", hence without fraud or actionable wrongdoing.

[3] No one seems to contend that any applicable regulation forbade the resale of the property to whomsoever Bensik chose. Nor are there any inhibitions against veterans having nonveteran partners in small business enterprises, so long as the veterans are not mere fronts. *See Lee v. United States*, 6 Cir., 167 F. 2d 137. Nor do we think the representations made for the first certification pertinent to the later certification for the property in question. The first priority was for the veteran's own use, not for resale. The second priority was for property intended for resale and the latter representation superseded the former and is relevant to the challenged transaction. Therein Bensik certified in effect that he was an established dealer, jobber or

distributor, purchasing for resale; that he was not a broker and would not use the property ordered to operate as such —in other words, that he was not acting as the agent of an undisclosed principal who was ineligible to purchase the property on a veteran's priority.

On December 10 (the date of the award to Bensik) Morey Bernstein wrote to the representative of the War Assets Administration in Denver who had certified Bensik's priority, confirming a telephone conversation on November 20 (the day after certification), wherein Bernstein had inquired whether, in the event Bensik's bid was successful, it would be satisfactory for Bensik, the sole owner of Modern Specialty Distributors and a salesman for Bernstein Brothers, to sell Bernstein Brothers a substantial portion of the material purchased, so long as he distributed the remainder among several different buyers. The letter indicated that the representative of the War Assets Administration had replied that in his opinion, there was no objection to this procedure. Three days later, however, the Chief of the Veterans' Division of the War Assets Administration in Denver, replying to Bernstein's letter, stated that "while Bensik is the man who should make the decision regarding the customers he serves", for his protection, and in view of the connection between Bensik and Bernstein Brothers, Bensik should contact the Office of the Regional Counsel for the War Assets Administration. On December 18, Bensik wrote to the Regional Counsel, stating that he was the owner and operator of the Modern Specialty Distributors and a salesman for Bernstein Brothers; that he had sold portable heaters before the San Antonio purchase; that he was definitely not acting as a broker; that "Bernstein Brothers merely want to purchase a lot of these heaters from me, but they are extremely careful and wanted to advise you of their action." The Regional counsel replied in part that "in your case, this office considers it definitely inadvisable for you to sell any part of the material which you purchased to a firm by which you are employed, inasmuch as the transaction would lead to the

conclusion that you might merely be acting as agent of that firm in the purchase of surplus property."

While this correspondence did generally advise the War Assets Administration that Bensik planned to sell a major portion of the property to Bernstein Brothers, it also served to advise the appellants that in the circumstances, the transaction smacked of an illegal agency. The first letter of December 10, reflecting the telephone conversation of November 20, left no doubt that from the very inception of the transaction, Bernstein Brothers intended to acquire the major portion of the heaters to be awarded to Bensik under his veteran's priority. In any event, there was nothing in the correspondence to indicate that the appellants relied upon statements contained in the government letters, or that they were deceived or misled in any way. In determining in the last analysis whether Bensik purchased the heaters for his own account as an established dealer for resale, or as a mere broker or agent for Bernstein Brothers, it is significant to note that the gains he realized from the 310 heaters is more like a broker's commission than an established dealer's legitimate profit.

When the evidence is considered in its entirety, we are certainly unable to say that the inferences which the trial court drew from the established facts were unwarranted, and that its judgment thereon is clearly erroneous.

[4] Invoking the rule in *Jencks v. United States*, 353 U.S. 657, 77 S.Ct 1007, 1 L.Ed.2d 1103, appellants complain of the refusal of the trial court to require the government to produce for purposes of impeachment on cross-examination, a report of a government witness made and submitted to the War Assets Administration in connection with his investigation of this case. Witness Poyen did make a report of his investigation in February 1947, and he did refresh his memory from it while testifying as a government witness.

[5,6] Simple justice and fundamental fairness becoming the sovereign require it to make available to the accused

any matter from which its witnesses testify, if such testimony is material and the credibility of the witness in respect thereto is attacked, and proper foundation is laid for impeachment. See *Jencks v. United States, supra; Communist Party of United States v. Subversive Activities Control Board*, 102 U.S. App. D.C. 395, 254 F. 2d 314. The operative facts in this case occurred in 1946; the case was filed in 1951, and tried in 1956. On pre-trial the court denied appellant's motion for the production of the Poyen report under Rule 34, Fed. Rules Civ. Proc. 28 U.S.C.A. Certainly if the report was relevant and not privileged for security reasons, see *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727; or as "an attorney's mental impressions, conclusions, opinions or legal theories", it was a proper subject for production and inspection under Rule 34 for good cause. See *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451. And, it was undoubtedly subject to production and inspection during trial for impeachment purposes if there was any material testimony to impeach.

On direct examination, witness Poyen testified that he went to Pueblo in 1947 to investigate the case for the War Assets Administration; that he contacted appellant Bensik at Bernstein Brothers Pipe and Machinery Company; that Bensik told him he had been working for Bernstein Brothers about six months for about $300 per month; that Bensik took him to his home in Pueblo and showed him a mock-up of a circular he proposed to distribute throughout the country for the promotion and sale of heaters. When asked if he recalled the substance of the mock-up for the circular, he answered, "well, having refreshed by memory from my report, I can report on it reasonably accurately." Then he proceeded to state the kind of heaters and the price at which they were to be sold, and other details of the proposed circular. The witness went on to state that in answer to questions, Bensik told him he had sold 510 of the heaters to Bernstein Brothers for $35 each under the written contract of December 24, 1946. He further testified that Bensik told him the 90 heaters he proposed to sell were in Bernstein

Brothers warehouse; that he had paid for all 600 of the heaters with a check for the full amount on the Modern Specialty Distributors. When asked how he had been financed, he refused to answer or give any information. The witness went on to state that almost immediately after filing his report with the Enforcement Division of War Assets Administration in Denver, he entered the private practice of law, and that soon thereafter Morey Bernstein called him on the telephone to inquire whether he might be available to act as his attorney in a case, and that he told him he would be unable to do so. When the witness was unable to recall the details of the conversation, government counsel claimed complete surprise, but abandoned further interrogation on that point. He then related a conversation with appellant Levy in the witness's law office. Levy wanted to know the status of the case, and whether in his investigation he had gotten information he needed. The witness advised him that he had completed his investigation, was in the private practice of law, and could not discuss it with him; and they then discussed his retention as an attorney for Bernstein Brothers, Mr. Levy saying that the fees were immaterial.

At this point, counsel for appellants made demand on the government to produce the report made by the witness to the government. The government objected on the grounds that no proper foundation had been laid, the government having abandoned "that line of questioning * * *." The court took the view that since counsel's objection to the witness's testimony based on the report had in the main been sustained, its production was not required unless cross-examination developed something that would entitle the appellants to see some part of the report. Counsel for appellants sought production of the report for impeachment purposes, and on the further ground that "throughout the examination the attorney for the government was constantly referring to this report."

The decisive fact is that witness Poyen testified to nothing from his report, either on direct or cross-examination.

that is disputed now or at the time of trial. His only disputed testimony concerned conversations with Bernstein and Levy, held after he had submitted his report and left the service of the government. In short, there was nothing in his testimony to impeach by reference to the report. We therefore hold that fundamental fairness exemplified in Jencks does not require a reversal of the court's ruling.

[7] Finally, appellants complain of the refusal of the court to permit appellant Levy to testify concerning advice of counsel on the validity of the Bensik-Levy contract, under which Levy's wife advanced the funds to purchase the heaters. Advice of counsel is invoked to show lack of fraudulent intent. Levy was permitted to testify that his attorney drew the Bensik-Levy contract on information given him by the parties, but the court refused to permit him to testify concerning advice of counsel on the validity of the contract.

[8] Generally, where, as here, fraud is an essential element of the charge, the accused may testify not only that he had no such intent, but he may buttress his statement by proof of conversations with other persons tending to support his statement. *Frank v. United States*, 10 Cir., 220 F.2d 559; *Haigler v. United States*, 10 Cir., 172 F. 2d 986; *Miller v. United States*, 10 Cir., 120 F.2d 968. The gravamen of this charge is, however, not the validity of the Bensik-Levy contract. Instead, it is an arrangement between the appellants, whereby Bensik used his veteran's priority to obtain government surplus property in behalf of and for the use and benefit of Bernstein Brothers. There was no testimony or offer of proof indicating that advice of counsel was sought or given concerning the legality of this particular arrangement. And see *McDonald v. United States*, 10 Cir., 246 F.2d 727.

Cross-Appeal

[9] The United States has appealed from that part of the judgment which puts it to an election of statutory reme-

lies under Section 26(b) of the Surplus Property Act of 1944, supra. Section 26(b) provided that any person who shall engage in a scheme or device condemned in this Section "(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit; or (2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or (3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be." The remedies thus provided are "in addition to all other criminal penalty and civil remedies provided by law." Sec. 26(d).

In its original complaint, filed in February 1950, the government prayed for twice the consideration paid the United States for the surplus property, in the amount of $39,912. In October, the government moved to amend, alleging that since the filing of the original complaint, it had come to the attention of the Department of Justice that the Bernsteins had made a large profit from the sale of the heaters alleged to have been fraudulently acquired by them; and that if the charges in the complaint were established; the Bernsteins would be liable to the government for the profits, thus greatly enhancing the amount to be recovered. In January 1952, an amended complaint was filed, in which the government sought restoration of the merchandise, or damages in the amount of the proceeds of the sale by the Bernsteins. And, it also reiterated its prayer for twice the consideration paid the government for the merchandise.

After answer to this complaint was filed, and pursuant to leave granted, the government again amended its complaint in April 1954 to pray in the alternative for (1) restoration of the property or the cash proceeds of its sale; (2) twice the consideration paid for the merchandise as originally demanded; and (3) or $2,000 plus twice the amount of damages which the government might have sustained in the sale.

In their answer to the last amended complaint, the appellants moved to compel the government to elect its remedy in accordance with the original complaint, viz., twice the amount of the consideration paid the government for the merchandise. This motion was denied in March 1955, but the government was ordered to elect which of the three remedies it would seek. The government thereupon elected to demand restoration of the property or the proceeds of the sale thereof, less the amount paid the government, together with interest and costs. In an amended answer to the last amended complaint and election filed February 27, 1956, appellants pleaded as a defense the election made in the government's original complaint to demand twice the consideration paid for the merchandise.

[10] The trial court assumed the availability of equitable restitution as an additional remedy "provided by law" under Section 26(d). And, we have no doubt of it. The court took the view, however, that the government was bound by its original election to affirm the transaction and seek twice the amount of the purchase price of the merchandise. In so doing, it applied the common law doctrine of election of remedies, according to which an aggrieved party with a cognizant choice of two or more remedies for inconsistent rights growing out of the same transaction, must elect one of the remedies to the exclusion of the others. See 18 Am. Jur. Election of Remedies, § 3, p. 129; *Kuhl v. Hanes*, 10 Cir., 212 F. 2d 37. "The doctrine of election of remedies is not a rule of substantive law. It is a rule of procedure or judicial administration. It is technical * * *". See Brandeis

dissenting in *United States v. Oregon Lumber Co.*, 260 U.S. 290, 304, 43 S.Ct. 160, 404, 67 L.Ed. 261. It has been consistently criticized as harsh and not a favorite of equity. See *Oil Well Supply Co. v. First National Bank of Winfield*, 10 Cir., 106 F.2d 399. It has been applied to suits by the government with caution. *Goldstein v. United States*, 8 Cir., 227 F.2d 1.

The trial court recognized that ordinarily an original complaint will not constitute an election precluding a prayer for an inconsistent remedy in an amendment. But the court was nevertheless constrained to enforce the election made in the original complaint because, if the doctrine is "not applicable here, it would be hard to conceive of an instance where it would be" for, said the court, the government "positively stated in its original complaint that it was making and asserting its election", and in so doing, it affirmed the sale to Bensik by seeking liquidated damages as provided in the statute, and having done so, it should not thereafter be permitted to elect to disaffirm the transaction by seeking restitution. The court observed that the government was undoubtedly apprised of the profits the Bernsteins were making on the resale of the heaters, the evidence showing that prior to the filing of the complaint, they had sold sixty-nine percent of the heaters and parts for $96,677.28, and that between the first complaint and the first amendment in 1951, they had sold $10,933 more, and thereafter $33,541.96; that the last heater was sold in March, and the final election was made in the following April. From this the trial court reasoned that the election the government made in April 1955 could very well have been made upon the filing of the first complaint in 1950. The court finally concluded that the appellants "should not be penalized for failing to guess which mode of relief the government would finally adopt, and during the entire period curtail their business and sell slow-moving merchandise accordingly." The court found ample evidence of damage to the appellants upon which the doctrine of election of remedies should rest.

[11] Whatever may be said for the common law doctrine of election of remedies before the advent of the Federal Rules of Civil Procedure, we are certain that there is no room for its application under applicable rules of procedure, according to which every pleading is a simple, concise statement of the operative facts on which relief can be granted on any sustainable legal theory "regardless of consistency, and whether based on legal or on equitable grounds or on both"; Rule 8(e) (1) (2) F.R. Civ. P., and, where the prayer or demand for relief is no part of the claim and the dimensions of the lawsuit are measured by what is proven. *Western Machinery Co. v. Consolidated Uranium Mines,* 10 Cir., 247 F. 2d 685; *Gins v. Mauser Plumbing Supply Co.,* 2 Cir., 148 F. 2d 974. When the complaint is judged in the context of the philosophy of these modern procedural concepts, we are convinced that the election of remedies is inapplicable here.

While the court applied the election of remedies with controlling effect, it seemingly weighed the equities as in restitution, and resolved them against the government. In any event, it found equitable grounds for holding the government to its original election. But judging the measure of relief to be granted under equitable restitution, we do not think the equities weigh in appellants' favor. In its motion to amend, filed in July 1951, the government alleged that it had been apprised of the fact that the Bernsteins had made a large profit on the sale of the heaters, and that if fraud was established, they would be liable for such profits. On this basis, leave was granted to amend to demand restoration or restitution. And, the trial court denied appellant's motion to require the government to stand upon its original demand. When the court required the government to elect one of its available remedies, it finally demanded restoration or restitution. The original demand or election was pleaded as a defense. The record shows that sixty-nine percent of the merchandise was sold prior to the original complaint, and that most of the remainder of the merchandise was sold after notice was given of the

government's intention to pursue its remedy in restitution. It cannot be said that the appellants proceeded in reliance upon the government's original election. Moreover, the appellants have no standing in equity to plead that their fraudulent pursuits would have been deterred by the severity of the penalty. We conclude that equitable restitution was available to the government.

The judgment on the appeal is affirmed, and the judgment on the cross-appeal is reversed, with directions to grant restitution.

REGULATIONS

"§ *8302.8,* Regulations P. 2069, U. S. Code, Cong. Service, 79th Cong., 2nd Sess. 1946. *Issuance of certificates to veterans.* (a) A veteran desiring to acquire property set aside under § 8302.4 or to exercise his priority under § 8302.5 shall apply to any certifying office of War Assets Administration and shall furnish the Administration with complete information regarding the property desired. War Assets Administration will satisfy itself through reference to the applicant's discharge papers or to other satisfactory evidence that the applicant is a veteran and that the property applied for is for his own personal use or to enable him to establish or maintain his own small business, professional, or agricultural enterprise and shall require of the applicant a supporting statement or affidavit. War Assets Administration will issue an appropriate certificate to such veteran stating that he is a veteran entitled to purchase the types and quanties of the property described therein."

This regulation was amended in the regulations of December 11, 1946, § 8302.8 page 2266, clarifying the distinction between purchases for resale and purchase of trucks under § 8302.4 and purchases for use in the veteran's own business. It reads:

"§ *8302.8. Issuance of certificates to veterans.* (a) A veteran desiring to acquire property set aside under § 8302.4 or to exercise his priority under § 8302.5 shall apply to any certifying office of War Assets Administration and shall furnish the Administration with complete information regarding the property desired. War Administration will satisfy itself through reference to the applicant's discharge papers or to other satisfactory evidence that the applicant is a veteran. *It shall also satisfy itself that the property applied for is to enable the veteran to establish or maintain his own small business, professional, or agricultural enterprise, or in the case of property set aside under § 8302.4 that it is for the veteran's own personal use or for his own small business, professional, or agricultural enterprise.* The War Assets Administration shall require of the applicant a supporting statement or affidavit. War Assets Administration will issue an appropriate certificate to such veteran stating that he is a veteran entitled to purchase the types and quantities of the property described therein. No person shall be certified as a veteran for property to be used in more than one small business, professional or agricultural enterprise, but a veteran may be certified for property set aside under § 8302.4 for his own personal use and may also be certified for other property for business, professional, or agricultural use."